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Guo Feng Ting v Ta Yang Agricode Sdn Bhd

B HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 23NCVC-89-12 OF 2013
TEO SAY ENG J
24 FEBRUARY 2015

C *Tort — Breach of statutory duty — Accident — Accident at workplace — Factory — Employee suffered serious physical injuries — Whether employee negligent — Employment contract contained clause discharging employer from liability and precluding employee from suing for damages — Whether claim for damages should succeed — Whether employer liable and owed duty of care* D *— Whether employer in breach of statutory duties — Apportionment of liability*

The plaintiff was employed by the defendant as an assistant production manager. The plaintiff met an accident at his workplace ('the premises') and suffered serious physical injuries and in furtherance to that, claimed for special E and general damages. It was the plaintiff's pleaded case that that the accident was caused by the defendant's negligence. The plaintiff further pleaded that the defendant was in breach of its statutory duties under the Factories and Machinery Act 1967 ('the Act'). The defendant raised a preliminary objection and argued that under clause of the employment agreement, the defendant was F discharged from liability and the plaintiff was precluded from suing for damages suffered by him as a result of the defendant's negligence. The defendant further argued that it was not in breach of any statutory responsibilities because the premises was not a factory under s 2 of the Act at the material time; the plaintiff was not authorised to supervise the works or to G be present at the premises at the material time; the conveyance of goods using the metal bin and forklift was not known, authorised, approved or consented to by the defendant.

Held, allowing the claim in part:

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(1) The plaintiff was 20% responsible for the incident. The apportionment of liability between the plaintiff and the defendant was 20:80, respectively (see para 31).

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(2) The plaintiff failed to particularise the relevant provisions under the Act and the facts relating to the provisions where breaches allegedly took place. The premises where the accident occurred had satisfied the requirements under s 2(1) of the Act. However, the court was not in the position to decide on the issue whether the accident was caused by the breach of any statutory duties under the Act on the part of the defendant.

The defendant was negligent in failing to take reasonable care for the safety of its workers in all the circumstances of the case so as not to expose them to unnecessary risk (see paras 12–14 & 24).

(3) The plaintiff was not bound by cl 3 of the employment agreement as the clause was in contravention of s 24 of the Contracts Act 1950 on the grounds that it would defeat the law granting the plaintiff a right to sue and was also against public policy. The plaintiff was instructed to be at the premises where the alleged accident took place by his immediate superior. He was therefore lawfully at the place of the accident at the material time as this was in line with the terms and conditions of his employment agreement which stipulated that the plaintiff was duly authorised to perform work and duties under the control and supervision of a superior officer (see paras 18 & 19(b)).

[Bahasa Malaysia summary

Plaintif diambil bekerja oleh defendan sebagai penolong pengurus pengeluaran. Plaintif terlibat dalam kemalangan di tempat kerjanya ('premis') dan mengalami kecederaan fizikal yang serius dan pelanjutan kepadanya, menuntut untuk ganti rugi khas dan am. Adalah kes rayuan plaintif bahawa kemalangan tersebut disebabkan oleh kecuaian defendan. Plaintif selanjutnya merayu bahawa defendan memungkiri kewajipan statutorinya di bawah Akta Kilang dan Jentera 1967 ('Akta'). Defendan membangkitkan bantahan awalan dan berhujah bahawa di bawah klausa perjanjian pekerjaan, defendan dilepaskan daripada liabiliti dan plaintif dihalang daripada menyaman untuk ganti rugi yang dialami olehnya akibat kecuaian defendan. Defendan selanjutnya berhujah bahawa ia tidak memungkiri apa-apa tanggungjawab statutori kerana premis tersebut bukan kilang di bawah s 2 Akta pada masa material; plaintif tidak dibenarkan untuk mengawasi kerja-kerja atau berada di premis pada masa material; pemindahan barangan menggunakan bin logam dan trak angkat-susun tidak ketahui, dibenarkan, diluluskan atau diizinkan oleh defendan.

Diputuskan, membenarkan sebahagian tuntuan:

(1) Plaintif bertanggungjawab sebanyak 20% bagi kejadian tersebut. Pembahagian liabiliti di antara plaintif dan defendan masing-masing adalah 20:80 (lihat perenggan 31).

(2) Plaintif gagal untuk memperincikan peruntukan relevan di bawah Akta dan fakta berkaitan kepada peruntukkan di mana kemungkiran yang didakwa terjadi. Premis di mana kemalangan berlaku telah memenuhi keperluan di bawah s 2(1) Akta. Walau bagaimanapun, mahkamah tidak dalam kedudukan untuk memutuskan atas isu sama ada kemalangan disebabkan oleh kemungkiran apa-apa kewajipan statutori di bawah Akta oleh pihak defendan. Defendan adalah cuai kerana gagal untuk

menjalankan kewajipan berhati-hati bagi keselamatan pekerja-pekerjanya dalam kesemua keadaan kes dengan itu tidak mendedahkan mereka kepada risiko yang tidak perlu (lihat perenggan 12–14 & 24).

(3) Plaintif tidak terikat kepada klausa 3 perjanjian pekerjaan kerana klausa tersebut bertentangan s 24 Akta Kontrak 1950 atas alasan bahawa ia akan menggagalkan undang-undang memberikan plaintif hak untuk menyaman dan juga adalah bertentangan polisi awam. Plaintif diarahkan untuk berada di premis di mana kemalangan yang didakwa tersebut terjadi oleh ketuanya. Dia oleh itu secara sah berada di tempat kemalangan pada masa material kerana ini adalah selaras dengan terma dan syarat perjanjian pekerjaannya yang menyatakan bahawa plaintif dibenarkan untuk melakukan kerja dan tugas di bawah penggawasan pegawai atasan (lihat perenggan 18 & 19(b)).]

Notes

For cases on accident, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 31–32.

Cases referred to

Affin Bank Bhd v Tan Sri Lee Kim Yew [2010] MLJU 1871; [2011] 8 CLJ 541, HC (refd)

Asia Control Systems Impac (M) Sdn Bhd v PNE PCB Bhd and another appeal [2010] 4 MLJ 332; [2010] 7 CLJ 316, CA (refd)

Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754; [1994] 3 CLJ 133, SC (refd)

Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals [2009] 6 MLJ 839; [2009] 6 CLJ 22, CA (refd)

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597; [2010] 1 CLJ 269, FC (refd)

Glamour Green Sdn Bhd v AmBank Bhd & Ors and another appeal [2007] 3 CLJ 413, CA (refd)

Goh Eng Chye v Amalgamated Lumber Sdn Bhd [1982] 2 MLJ 180, FC (not folld)

Hairudin Haron & Ors v See Yong Teck & Ors [2014] 1 LNS 698, HC (refd)

Malaysia Land Properties Sdn Bhd (formerly known as Vintage Fame Sdn Bhd) v Tan Peng Foo [2014] 1 MLJ 718; [2013] 3 CLJ 663, CA (refd)

PKNS Holdings Sdn Bhd v Nusa Gapurna Development Sdn Bhd & Anor [2014] 1 LNS 519, HC (refd)

Phua Corp Sdn Bhd v Newacres Sdn Bhd [1992] 4 CLJ 2179; [1992] 3 CLJ Rep 274, HC (refd)

Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd [2006] 3 MLJ 131; [2006] 2 CLJ 337, CA (refd)

Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)

Legislation referred to

Civil Law Act 1956 s 28A
Contracts Act 1950 ss 20, 24, 30
Evidence Act 1950 s 73A
Factories and Machinery Act 1967 s 2, 2(1)

S Gunasegaran (J Chandrika and K Meneka with him) (John, Ang & Guna) for the plaintiff.
Bahari Yeow Tien Hong (Lim Zhi Jian with him) (Lee Hishammuddin Allen & Gledhill) for the defendant.

Teo Say Eng J:

OVERVIEW

[1] The plaintiff was a Chinese national who was employed as an assistant production manager of the defendant as at 1 October 2010 vide the employment contract dated 1 October 2010.

[2] On 28 March 2011, it is alleged that the plaintiff met an accident at his workplace in the course of his employment and suffered serious physical injuries.

[3] The plaintiff had instituted this claim against the defendant (his employer) seeking damages for his injuries and consequential loss suffered by him as a result of the said accident which was allegedly caused by the breach of statutory duties of the defendant (his employer) or the negligence on the part of the defendant, its servants or agents.

[4] During the trial on 5 May 2014 the plaintiff's counsel confirmed that the plaintiff would abandon his claim in item 37 under Particulars of Special Damages in his statement of claim.

[5] The trial of this case took six days. The plaintiff has called six witnesses to prove his claim whereas the defendant, two witnesses.

THE PLAINTIFF'S CLAIM

[6] The plaintiff has essentially pleaded that the alleged accident was caused by the breach of statutory duty under the Factories and Machinery Act 1967 on the part of the defendant or the negligence of the defendant, its servants or agents.

A DEFENCE

[7] The defendant has denied liability on the grounds stated in its statement of defence. The grounds, among others are:

B (a) that the conveyance of goods by using the metal bin and forklift was not known by the defendant;

(b) that the use of the metal bin and forklift as a method of conveyance was not authorised, approved or consented to by the defendant;

C (c) that the factory manager Mr Gong (DW1) constructed the bin on his own, without the knowledge or approval of the defendant;

(d) that the defendant had devised rules and procedure for the conveyance of goods within the factory;

D (e) that the plaintiff was not authorised to supervise the works in the factory or to be present at the place of the accident at the material time;

(f) that the plaintiff was present at the place of accident without the authority or knowledge of the defendant and/or without following the E rules and/or guidelines issued by the defendant;

(g) that the plaintiff was in breach of the terms of employment (as per the defendant's letter of offer) in that:

(i) he was present at the place of accident without the authority or F permission of the defendant;

(ii) in using or assisting the others in using the metal bin and forklift he had acted without the consent or approval of the defendant;

(iii) he had failed or refused to abide by the company rules and G regulations by not using the machinery approved by the defendant to convey goods;

(h) that the accident was caused solely by or alternatively contributed by the plaintiff's negligence;

H (i) that the plaintiff had willingly accepted all risks pertaining to the said operation which was extraordinary and beyond the reasonable contemplation of the defendant and that the defendant owed no responsibility in respect of the same;

I (j) that the defendant had taken all reasonable steps to discharge its duties and responsibilities under the law;

(k) that the defendant was also not in breach of any responsibilities under the Factories and Machinery Act 1967;

(l) that the defendant had taken reasonable steps to provide a safe system of work for the plaintiff, that the place of work was free from danger, in engaging competent workers to handle the forklift and to perform general duties in the ordinary course of business, and in ensuring that the workers practised proper safety standards; and

(m) that for reasons known only to the plaintiff, the plaintiff without the directive or knowledge of the defendant had at the material time decided on his own to stand at a very close range of the said iron bin and forklift and by so doing was prepared to bear all risks arising from his own action and that the defendant did not bear any form of responsibility.

[8] At the end of the trial both parties have submitted the following written submissions for the court's consideration:

(a)	*hujahan plaintif*	–	HP
(b)	*ikatan otoriti plaintif*	–	HPO
(c)	the defendant's submissions	–	HD
(d)	*ikatan otoriti defendan* Vol 1	–	HDO(1)
(e)	*ikatan otoriti defendan* Vol 2	–	HDO(2)
(f)	*hujahan balas plaintif*	–	HPB
(g)	*ikatan otoriti plaintif*	–	HPB(O)
(h)	the defendant's bundle of authority Vol 3	–	HDO(3)
(i)	the defendant's bundle of authority Vol 4	–	HDO(4)
(j)	the defendant's submission-in-reply	–	HDB

EVALUATION OF EVIDENCE AND RULINGS OF THE COURT ON THE ISSUE OF LIABILITY

Issue No 1

Whether the defendant was in breach of its statutory duty under the Factories and Machinery Act 1967?

[9] The plaintiff alleged that the defendant had breached the statutory duty under the Factories and Machinery Act 1967.

[10] The main contention of the defendant was that the Factories and Machinery Act 1967 is not applicable on the simple ground that at the material time of the accident the premises was not a factory as defined under s 2 of the Factories and Machinery Act 1967. The defendant submits that at the time of the incident the premise was in the process of being set up to act as a place to produce or process fertiliser. It had not begun any process of producing any fertiliser. Only trial runs of processes and machinery were conducted. The defendant further submits that the plaintiff has failed to lead any evidence to

establish that the premises was a factory as defined under the Factories and Machinery Act 1967 ('the FMA'). The defendant further submits that even if the FMA were to be applicable to the premises, there was no breach of the Factories and Machinery Act 1967 committed by the defendant.

[11] The plaintiff in reply submits that the evidence adduced in this case clearly shows that persons were employed in manual labour for the purpose of manufacturing (making) fertiliser and that the said work was carried on by way of trade for the purpose of gain (that is, for a commercial purpose). It does not matter one bit whether at the material time the factory had begun production or was just carrying test runs. The plaintiff submits that the premises in question has satisfied the two requirements under s 2(1) of the Factories and Machinery Act 1967.

Ruling of the court

[12] Having perused the evidence adduced, I am satisfied that the 'premises' where the accident occurred has satisfied the two requirements under s 2(1) of the Factories and Machinery Act 1967 and hence the Factories and Machinery Act 1967 is applicable in our present case.

[13] Be that as it may, I find that the plaintiff has failed to particularise the relevant provisions under the Factories and Machinery Act 1967 and the facts relating to the provisions where breaches were alleged to have taken place. I also find that no evidence had been led to establish the breach of any particular provisions under the Factories and Machinery Act 1967.

[14] Hence I am not in the position to decide on the above issue, that is, whether the aforesaid accident was caused by the breach of any of the statutory duties under the Factories and Machinery Act 1967 on the part of the defendant.

Issue No 2

However since the defendant being a company, the correct issue for determination should be whether the company was negligent in causing the said accident or was vicariously liable for the tort committed by its servant or agent?

[15] The defendant submits that the issue of vicarious liability was not pleaded by the plaintiff. With respect, I do not agree with such a contention. A perusal of paras 5 and 7 of the statement of claim shows that the plaintiff did

plead that the alleged accident was caused by the negligence of the defendant's servant or agent in the course of his employment. This, to me, is the pleading of vicarious liability of the employer.

Preliminary issue

[16] Before the determination of the issue of vicarious liability, the defendant has raised a preliminary issue that the plaintiff is bound by the terms of the agreements between the plaintiff and the defendant and the plaintiff's claim is contrary to the terms of the agreement and should be estopped from making further claim against the defendant in respect of the incident based on the following grounds:

(a) upon the request of the plaintiff, the defendant allowed the plaintiff to leave Malaysia in May 2011. By the defendant's letter to the plaintiff dated 25 May 2011 ('first letter' – Part A document), the defendant had agreed, amongst others, as follows:

  (i) to allow the plaintiff to take pay leave for six months;

  (ii) to bear the maximum of RM40K for medical expenses with the support of receipts, including travelling expenses and the balance shall be at the plaintiff's own expenses; and

  (iii) to allow the plaintiff a maximum of 12 months (from 27 September 2011–27 September 2012) unpaid leave after six months paid leave;

(b) notwithstanding the terms of the employment contract, that is, cl (g) (at pp 7–8 Bundle B (Part A document)), the defendant honoured or performed its obligation under the terms of the first letter by not exercising its right to terminate the plaintiff's employment;

(c) the defendant had continued to pay salary to the plaintiff for nine months in full, which is over and above the terms in the first letter. This is admitted by the plaintiff;

(d) upon the return of the plaintiff in November 2011, the plaintiff and the defendant had entered into an agreement, the terms of which were duly recorded in the defendant's letters dated 12 December 2011 ('second letter' (D45) and 'third letter' (D44) respectively);

(e) it is not disputed that the plaintiff and the defendant had signed the second and third letters (collectively refer to as the 'agreement');

(f) based on the agreement, the plaintiff and the defendant agreed as follows:

  (i) the defendant will appoint the plaintiff as the Production Executive;

  (ii) the plaintiff will be paid a basic salary of RM2,400 per month and

attendance allowance of RM100 per month effective from 1 January 2012; and

(iii) with regard to the incident:

(1) the defendant will assist in getting the full amount of insurance compensation which amounted to a total of RM50,000; and

(2) the defendant is hereby being discharged from further medical and legal obligations, which include travelling expenses not otherwise stated on the employment contract;

(g) the plaintiff accepted the defendant's offer in the second and third letters, commenced work and was paid salary in his new job capacity. This is not disputed and is consistent with the parties' pleadings;

(h) the defendant had paid for the medical expenses of the plaintiff. This is admitted by the plaintiff;

(i) the defendant had assisted in claiming insurance from MCIS Zurich. However, MCIS Zurich offered only RM4,642.86 because based on the doctor's report that they were provided with, there was no indication of any permanency in the plaintiff's condition. The defendant appealed to MCIS Zurich for a higher sum. MCIS Zurich maintained their position and rejected the defendant's appeal;

(j) the defendant submits that:

(i) the plaintiff's claim is contrary to the terms of the agreement; and

(ii) the plaintiff is estopped from making further claim against the defendant in respect of the incident;

(k) the defendant further submits that this honourable court ought to give full effect to the explicit intention of the parties as expressed in the agreement and not to rewrite the terms contained in the agreement which provide the explicit intention of the parties: *Hairudin Haron & Ors v See Yong Teck & Ors* [2014] 1 LNS 698, paras 20 and 27 (Gunalan Muniandy JC) (123 @ 131 DBA1); *Setapak Heights Development Sdn Bhd v Tekno Kota Sdn Bhd* [2006] 3 MLJ 131; [2006] 2 CLJ 337, (CA), para 27 (135 @ 144–145 and 149 DBA1); *Malaysia Land Properties Sdn Bhd (formerly known as Vintage Fame Sdn Bhd) v Tan Peng Foo* [2014] 1 MLJ 718; [2013] 3 CLJ 663, (CA), para 12(g) and (h) (147 @ 157 DBA1); *Phua Corp Sdn Bhd v Newacres Sdn Bhd* [1992] 4 CLJ 2179; [1992] 3 CLJ Rep 274 (160 @ 164 DBA1); *Affin Bank Bhd v Tan Sri Lee Kim Yew* [2010] MLJU 1871; [2011] 8 CLJ 541 (167 @ 181 DBA1); *Asia Control Systems Impac (M) Sdn Bhd v PNE PCB Bhd and another appeal* [2010] 4 MLJ 332; [2010] 7 CLJ 316, (CA) (per Low Hop Bing JCA at para 15) (189 @ 190 DBA1); and *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals* [2009] 6 MLJ 839; [2009] 6 CLJ 22,

(CA) (para 28) (198 @ 212 DBA1);

(l) the parties to an agreement must respect and uphold the sanctity of the terms of the agreement that they had agreed upon: *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 (217 @ 224 DBA1); *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754; [1994] 3 CLJ 133 (225 @ 231 DBA1); *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269 (236 @247 DBA1); *Glamour Green Sdn Bhd v AmBank Bhd & Ors and another appeal* [2007] 3 CLJ 413, (CA) (267 @ 290 DBA1); and *PKNS Holdings Sdn Bhd v Nusa Gapurna Development Sdn Bhd & Anor* [2014] 1 LNS 519 (Hasnah Dato' Mohammed Hashim J) (293 @ 310 DBA1); and

(m) the plaintiff is bound by the terms of the agreement and the defendant ought not to be liable. Thus, the defendant prays that the plaintiff's claim be dismissed.

The plaintiff's submission

[17] The plaintiff submits that the defendant's contention as aforesaid is frivolous, mischievous and misconceived for the following reasons:

(a) exh D45 (at Bundle L pp 6–8) is just a letter from the defendant appointing the plaintiff to his new job as production executive and is not relevant;

(b) exh D44 (at Bundle L pp 4–5) is a letter issued by the defendant to the plaintiff under the heading 'Welfare & Benefit Policy'. As the first paragraph itself says, the letter was issued in line with 'the Company's Policy to ensure our employees' welfare and benefits'. Thus the whole letter must be read in line with the purpose of the company to provide benefits to the worker and not to curtail or restrict his benefits and legal rights in any way;

(c) the defendant is specifically relying on Conditions 2 and 3 of the said letter for its contention, but there is nothing there that can give rise to such interpretation. For ease of reference, the two conditions are reproduced below:

> 2. Pertaining to previous workplace accident that took place on 26th March 2011, the Company will assist in getting full amount of insurance compensation for total disablement, which amounted to total RM50,000.00.
>
> 3. With respect to condition 2 above, the Company hereby being discharged from further medical and legal obligations. This includes travelling expenses not otherwise stated on Employment Contract dated 1 October 2010 (Ref No TYA-HRD/0910-APPL) and duly signed by you on 9 October 2010.

From the wording of Condition 3 it is plain that it does not stand alone, but must be read subject to Condition 2. The said Condition 2 deals specifically with the company's obligation to claim 'insurance compensation' amounting to RM50,000 being the group personal accident insurance policy taken on by the company (defendant) from MCIS Zurich (see pp 206–208 of Bundle B). So when Condition 3 talks about the company being 'discharged from further medical and legal obligation' it must refer to the company's (the defendant's) obligation to pursue the 'insurance compensation for total disablement' as stated in Condition 2. This is the plain, ordinary, literal and logical interpretation of Condition 3 and that to interpret the condition to mean that the plaintiff had signed away his legal rights to claim compensation against the defendant for failing to provide a safe system of work, is bizarre;

(d) further or in the alternative, Condition 3(d) is vague, ambiguous and imprecise, and is capable of more than one interpretation.

As exh D44 was prepared by the defendant and it is the defendant who now seeks to rely upon it, the plaintiff fully submits that the *contra proferentem* rule ought to be invoked and the interpretation favourable to the plaintiff ought to be given;

(e) before the commencement of the trial, the parties have filed their respective issues for determination by this honourable court (marked as 'D' and 'E'). This issue was not one of the issues for determination posed by the parties. As such, the issue, even if pleaded, is deemed to be abandoned, and cannot be raised in submission;

(f) finally exh D44 in so far as it purports to discharge the defendant from liability and precludes the plaintiff from instituting a civil suit to claim compensation for damages suffered by him as a result of the defendant's negligence is void and unenforceable on the following grounds:

(i) under s 24 of the Contracts Act 1950 every agreement, of which the object or consideration is unlawful is void and that it is unlawful when:

(a) it is forbidden by law;

(b) it is of such a nature that, if permitted, it would defeat any law;

(c) it is fraudulent;

(d) it involves or implies injury to the person or property of another; or

(e) the court regards it as immoral, or opposed to public policy.

The plaintiff submits that the plaintiff who has suffered injuries and losses under the law has a fundamental right to seek justice from the courts. Any attempt to stifle that right, if permitted, would defeat the very law that grants him such a right. Such an agreement is also immoral or opposed to public policy. When parties are of unequal power and standing, it is all so easy for the person in

superior position to secure an unfair advantage over the person in an inferior or weaker position. This, the court must strike out as immoral or opposed to public policy. Employers who face a potential suit for negligence from the employees should be brave enough to face their opponent in court and fight the case on the basis of merit and not resort to such underhand tactics as adopted by the defendant in the present case.

(ii) s 20 of the Contracts Act 1950 states that 'Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual proceedings in the ordinary … is void to the extent'. The section provides three exceptions that are not relevant to our case. In the present case the plaintiff has a contract of employment with the defendant, which contains certain express and implied duties on the part of the employer, including the duty to provide a safe system of work, which the defendant may not seek to avoid by entering into any agreement to preclude the plaintiff from enforcing his rights; and

(iii) in the alternative the plaintiff relies on s 30 of the Contracts Act 1950 which says: 'Agreements, the meaning of which is not certain, or capable of being made certain, are void'.

The uncertainty in the clause in exh D44 is whether the defendant is discharged from its legal obligations merely in respect of the insurance claim or from its common law and statutory liability in respect of the accident itself.

RULING OF THE COURT

Preliminary issue

[18] I have ruled that the plaintiff is not bound by cl 3 of D44 which is void and unenforceable as it purports to discharge the defendant from liability and precludes the plaintiff from suing for damages suffered by him as a result of the defendant's negligence and this is in contravention of s 24 of the Contracts Act 1950 on the grounds that it would defeat the law granting the plaintiff a right to sue and is also against public policy. Further I agree with the contention of the plaintiff that this issue was not included as one of the issues for determination. Hence the defendant is not allowed to raise the issue which is not in the list of issues for determination.

Second issue

[19] In determining the aforesaid issue No 2, I have come to the following findings of facts based on the evidence adduced by both the parties:

(a) the plaintiff and DW1 are the employees of the defendant DW1 was employed as the factory manager whereas plaintiff was employed as assistant product manager/production manager. The dispute here is whether the plaintiff is the assistant production manager or the

production manager of the defendant. However I find that the dispute is not material as the fact remains that the plaintiff was still an employee of the defendant and was under the supervision of DW1 who was in charge of the entire works in the said factory at the time of the alleged accident;

(b) although the plaintiff was instructed to be based at Chan Chun Chan factory he was present at the premises where the alleged accident took place upon the instruction of DW1, who was his immediate superior. He was therefore lawfully at the place of the accident at the material time. He was there to assist DW1. This was in line with the terms and conditions of his employment agreement that is, the plaintiff was duly authorised to perform work and duties under the control and supervision of a superior officer;

(c) at the time of the accident, the premises was being set up as a place to produce/process fertiliser. It was 70% completed. The plaintiff was asked to assist in the trial/test runs of the process and machinery;

(d) the said premises is a factory as defined under 2(1) of the Factories and Machinery Act 1967;

(e) the sieving machine was not functioning properly and they had to transport raw materials from the sieving machine to the mixing machine manually;

(f) DW1 had informed DW2 Mr Wan about the machine not working properly and he was told to contact the machinery supplier regarding the faulty machine and he did so and the supplier agreed to supply one machine with automatic convergence systems within one to two months;

(g) DW1 had to devise an alternative method to be used temporarily as the factory was in no position to wait that long before starting work; and

(h) as the factory manager, he devised an alternative method to convey the raw material by asking one Lee Sia Fong to construct a metal bin.

The dispute is whether the construction and the utilisation of the metal bin as an alternative way of transporting raw material was within the knowledge of the defendant that is, DW2

[20] The defendant submits that:

(a) the creation and utilisation of the bin was not instructed by the defendant;

(b) no permission or authority was sought from the defendant to create and utilise the bin; and

(c) the above was not informed to the plaintiff.

[21] I find that the evidence adduced in totality does not support the defendant's contention. A

[22] Having perused the evidence adduced in totality I find that the version given by DW1 and DW2 is highly improbable and should be rejected for the following reasons: B

(a) DW2's testimony that he did not know DW1 was constructing a bin and had he known, he would not have allowed them to do so is illogical because: C

(i) DW1 said DW2 saw them constructing the bin;

(ii) DW2 said he was in and out of the factory on daily basis when the bin was being constructed;

(iii) it is unacceptable that DW1 said he did not inform DW2 of the alternative method devised by him because without the alternative method to rectify the problem production would be disrupted; D

(iv) no express instruction was given not to use method other than those provided in the premises; and

(v) the method devised is within the implied power of DW2 as the factory manager. E

[23] I therefore hold that the totality of the evidence had proved on the balance of probabilities that the construction and utilisation of the bin as an alternative method of conveying the raw material was with the knowledge and with the tacit approval of the defendant that is, DW2. F

[24] In the circumstances I find that the defendant was negligent in failing to take reasonable care for the safety of its workers in all the circumstances of the case so as not to expose them to unnecessary risk namely (i) failing to engage competent skilful forklift driver to carry the said bin; (ii) failing to use a safe method of transporting or conveying the raw material in question at the material time, (iii) failing to ensure that its employees observe the safety rules for the operation of the forklift; (iv) failing to take reasonable care to prevent injury, loss or damage from the danger from the unusual way of conveying raw material. G H

[25] Even if I was wrong in holding that the construction and utilisation of the bin was without the knowledge, and tacit approval of DW2, I am still of the view that defendant was vicariously liable for the tort of negligence committed by DW1 in the course of his employment by applying the *Salmond* test. I

[26] Under the *Salmond* test, an employee's tort will have been committed in

the course of his employment if the employee did something he was employed to do by committing that tort.

[27] DW1 being the factory manager was employed to ensure that all the machineries in the factory were running smoothly so that the production of the company would not be affected. When the sieving machinery was not functioning properly, he had to devise an alternative method that is, to construct a bin to convey the raw material from the sieving machine to the mixing machine. As the factory manager, what he did was what he was employed to do to ensure the machineries were running smoothly and the production line was not disrupted. He had informed the management that is, DW2 about the faulty machinery and was told to contact the supplier and he did so and when he was told by the supplier that he had to wait for a month or two, he proceeded to devise an alternative method that is, to construct a metal bin so that the production was not disrupted. I find that what DW1 did although by an unauthorised means but for the benefit of the company that is, to meet the orders placed by the customer.

[28] Applying the *Salmond* test, I hold that the defendant was vicariously liable for the tort committed by DW1, an employee of the defendant.

Third issue

Whether the plaintiff was guilty of contributory negligence?

[29] Our case is not in respect of whether the accident was caused by breach of statutory duty therefore the principles laid down by Federal Court in *Goh Eng Chye v Amalgamated Lumber Sdn Bhd* with regard to contributory negligence by the workman is inapplicable.

[30] The evidence adduced by the parties clearly shows that:

(a) the plaintiff knew that the bin was dangerous;

(b) he stood in close proximity to the bin – failing to stand at a safe distance; and

(c) he did not know how the accident occurred and did not see the bin falling as the bin had fallen on his back.

[31] I am of the view that the plaintiff owed a duty to himself to take precaution for his own safety. From the facts adduced I hold that he was 20% responsible for the incident, I therefore apportion the liability between the plaintiff and the defendant as 20:80 respectively.

QUANTUM

[32] The plaintiff claims the following damages:

(1) Special damages:

1)	Medical expenses at Hospital Sultanah Aminah Johor Bahru to date hereof and continuing	RM210
2)	Cost of quotation from Teh Lin Prosthetic & Orthopaedic	RM180
3)	Cost of purchasing medical reports	RM160
4)	Cost of purchasing specialist report	RM735
5)	Company search	RM13
6)	Cost of translating documents at RMB6,000	RM3,000
7)	Cost of translation and certificate of translation	RM250
8)	Cost of taxi fare paid by wife to visit the plaintiff in hospital RM80 x 20 days	RM1,600
9)	Wife's loss of income of RMB2,500 (RM1,250) a month for seven months	RM8,750
10)	Taxi fare paid by plaintiff to seek treatment in Malaysia	RM10,020
11)	Cost of medical treatment, physiotherapy and rehabilitation in China	RM98,522.85
12)	Cost of physiotherapy at Western Recovery	RM7,410
13)	Cost of acupuncture at Pusat Rawatan & Akupunktur Kang Sheng	RM3,020
14)	Cost of treatment at JB Specialist Hospital	RM196
15)	Costs of treatment in China	RM98,522.85
16)	Cost of treatment at Puteri Specialist Hospital Johor Bahru	RM6,184.45
17)	Cost of treatment at Klinik Chew & Surgery, Kulai	RM500
18)	Cost of treatment at Klinik Senai	RM111
19)	Cost of treatment at Klinik Sandhu Senai	RM33
20)	Cost of treatment at Klinik Dhas, Senai	RM121
21)	Cost of treatment at Kerala Ayurvedic Centre Senai	RM1,100
22)	Cost of treatment at Golden Health Care Centre	RM45
23)	Cost of consultation and treatment at Kempas Medical Centre, Johor Bahru	RM126
24)	Cost of medication purchased at My Pharmacy, Senai	RM779.20
25)	Cost of purchasing catheters through Hospital Sultanah Aminah Johor Bahru	RM204

26)	Cost of purchasing catheters from Globe Link Solution Sdn Bhd, Melaka	RM370
27)	Cost of purchasing catheters from Globe Link Solution Sdn Bhd, Melaka	RM306
28)	Cost of purchasing 1 unit of custom-made ankle foot orthosis (AFO) with solid ankle from Teh Lin Prosthetic & Orthopedic Co Sdn Bhd	RM1,200
29)	Pre-trial loss of earnings	RM18,000
	TOTAL	RM261,669.35

(2) General damages:

1)	Fracture dislocation of L4 vertebra with paraplegia	RM250,000
2)	Open fracture grade II lower right tibia and fibula	RM30,000
3)	Scars	RM8,000
4)	Cost of future physiotherapy	RM97,200
5)	Cost of future visits to urologist	RM54,000
6)	Cost of future purchase of catheters	RM32,400
7)	Cost of future medication for passing stool	RM32,400
8)	Cost of future replacement of ankle foot orthosis (AF)	RM53,666
9)	Cost of future domestic help and care	RM291,600
10)	Post-trial loss of earnings	RM300,000
	TOTAL	RM1,146,269

AWARDS OF THE COURT BASED ON 100% LIABILITY

Special damages

[33] It is trite law that special damages have to be specifically pleaded and strictly proved.

(a) Medical treatment, physiotherapy and rehabilitation in China

Items 11 and 15

I disallowed the claim under this item for the following reasons:

(i) it has been established through PW5 that such treatments (physiotherapy and rehabilitation) could be done in Malaysia and there is no evidence to indicate that the local treatments are inferior to those in China;

(ii) the authencity and contents of the document relied upon by the plaintiff for his claim have not been proven; and

(iii) those documents are Part C documents which are inadmissible.

(Note: s 73A of the Evidence Act 1950 has not been complied with).

(b) Cost of proceedings

I agree with learned counsel for the defendant that items No (2), (3), (4), (5), (6) and (7) – should be classified as costs of proceedings. I therefore order that such costs to be costs in the cause.

(c) Cost of taxi fare paid by wife to visit the plaintiff in hospital

Item 8: I disallowed this item because it is not pleaded.

(d) Wife's loss of income of RMB2,500 a month for seven months – rm8,750

Item 9: I disallowed this item because the claim is not supported by any documentary evidence.

(e) Medical expenses incurred in Malaysia

Items 12–14 and 16–28: According to Dr Yoga and Dr Daniel's medical reports, continuous physiotherapy and rehabilitation are necessary treatments for the plaintiff. The plaintiff is therefore entitled to claim for the costs of treatment physiotherapy and rehabilitation that he had incurred locally. I find that the treatments are necessary and the costs incurred are reasonable.

For the above reasons, I allowed the claims for the following items except items 25–27, the cost of purchasing catheters totalling RM880 (RM204 + RM370 + RM306) since the plaintiff admitted that the said claims had been paid for by the defendant:

Item 12	Cost of physiotherapy at Western Recovery – RM7,410
Item13	Cost of acupuncture at Kang Sheng – RM3,020
Item14	Cost of treatment at JB Specialist Hospital – RM196
Item16	Cost of treatment at Puteri Specialist Hospital – RM4,122.97

Note: I allowed RM4,122.97 after deducting one third (RM2,061.48) from the original claim of RM6,174.45.

Item 17	Cost of treatment at Klinik Chew & Surgery – RM500
Item 18	Cost of treatment at Klinik Senai – RM111
Item 19	Cost of treatment at Klinik Sandhu – RM33
Item 20	Cost of treatment at Klinik Dhas Senai – RM121
Item 21	Cost of treatment at Kerala Ayurvedic Centre – RM1,100
Item 22	Cost of treatment at Golden Gate Health Centre – RM45
Item 23	Cost of consultation and treatment at Kempas Medical Centre Johor Bahru – RM126
Item 24	Cost of medication purchased at My Pharmacy Senai – RM779
Item 28	Cost of purchasing 1 unit of custom made AFO with solid ankle from Teh Lin Prosthetic & Orthopedic Co Sdn Bhd – RM1,200

(f) Taxi fare incurred in Malaysia

Item 10 I allowed the claim for taxi fare paid by plaintiff to seek treatment in Malaysia – RM10,020

(g) Pre-trial loss of earnings

Item 29 Pre-trial loss of income – RM18,000 I allowed the claim for this item which is confined to nine months from December 2013–August 2014 but excluding the claim from the date of accident to the date of consent judgment obtained in Labour Court in November 2013.

(2) General damages

(a) Pain and suffering

(i) Fracture dislocation of L4 vertebra with disabilities and not paraplegia:

Item 1: An award of RM80,000 is reasonable.

(ii) Open fracture grade L1 lower right tibia and fibula:

Item 2: RM30,000 is awarded;

(iii) Scars:

Item 3: RM5,000 is awarded.

(b) Cost of future treatment

I agree with the submission of learned counsel for the defendant that based on the current condition of the plaintiff as confirmed by his orthopedic surgeon (PW5), it is clear that plaintiff does not suffer from paraplegia. However PW5 did confirm that the plaintiff would not be able to return to his job due to the injuries and disabilities he had suffered as a result of the accident and he was

only able to do some desk jobs. PW5 also confirmed that the Plaintiff may need weekly physiotherapy for a long duration meaning lifelong to improve his muscle bulk and to keep his joints supple. I therefore ruled that the plaintiff is entitled to claim for future treatment.

The plaintiff was 33 year old at the time of the trial of this suit. I adopt the average life expectancy of a Chinese male to be 74 based on the World Health Organisation 2013 statistics as suggested by learned counsel for the plaintiff. The multiplier for calculating the cost of future treatment is worked out as follows:

> 74 (average life expectancy) – 33 (plaintiff's age) – 1/3 (advance payment and contingency) = 27.3 years.

(i) Cost of future physiotherapy:

> Item 4:
>
> I allowed Item 4 based on testimony of Dr Yoga Raj and his specialist report which states, among other things that 'physiotherapy will improve the muscle bulk and keep his joints supple. This will cost him RM50.00 per visit. He may need weekly physiotherapy for a long duration meaning life long'. I followed the rate, that is, RM50 per month, recommended by Dr Yoga Raj and awarded RM16,200 for this item based on the following calculation using the multiplier of 27 years:
>
> > RM50 x 12 x 27 = RM16,200

(ii) Cost of future visits to urologist: Item 5:

> I awarded RM54,000 calculated as follows:
>
> > RM500 (every 3 months) x 4 x 27 = RM54,000

(iii) Cost of future purchase of catheters: Item 6:

> I awarded RM32,400 based on the following calculation:
>
> > RM100 x 12 x 27 = RM32,400
> >
> > (Average cost of catheters at RM100 per unit and the recommended period of replacement is 30 days).

(iv) Cost of medication for passing stool: Item 7:

> I awarded RM32,400 based on the following calculation:
>
> > RM100 x 12 x 27 = RM32,400

(RM100 per month).

(v) Item 8 – cost of replacement of AFO: Item 8 I allowed the first item only from the quotation for Quo Feng Ting (exh P6) based on Dr Yoga Raj's recommendation calculated as follows:

RM50,400 – 1/3 (RM16,800) = RM33,600

(c) Cost of future Domestic help and care: RM291,600.

Item 9:

I find that there was insufficient evidence to show the need of future domestic help and care. Hence I disallowed the claim for this item.

(d) Post-trial loss of earning: RM300,000.

Item 10:

(a) the plaintiff was working as a production manager at the time of the accident and received an income of RM3,000;

(b) Dr Yoga Raj has stated in no uncertain terms in his specialist report that the plaintiff will not be able to return to this job as a result of the injuries and disabilities he suffered from the accident; and

(c) however the plaintiff could still do some sedentary work.

For the above reasons, I agree with the suggestion of learned counsel for the plaintiff that it would be fair and reasonable to award a sum of RM2,000 a month as his net loss of earnings.

[34] I therefore allowed RM300,000 as the post trial loss of earnings based on the following calculation: RM2,000 x 150 months = RM300,000.

Note: The statutory multiplier for assessing loss of earning provided under s 28A of the Civil Law Act 1956 is 16 years (192 months) since the plaintiff was 30 years old at the time of the accident. The figure of 150 months is derived at from the following calculation:

192 months (multiplier) minus 42 months, (the number of months of pre trial loss of income that is, from the date of accident to the date of the trial that is, March 2011–August 2014).

Cost, interest and security for cost

[35] I ordered the defendant to pay the plaintiff cost of RM18,000 plus the usual interest awarded in a running down case.

[36] I also ordered the security for cost to be returned to the plaintiff.

Claim allowed in part.

Reported by Afiq Mohamad